85-1869

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK L. HOOK,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "tax evasion" statute, 26 U.S.C. §7201, proscribes an attempt to evade the payment of taxes through concealment of assets where another statute, 26 U.S.C. §7206(4), which carries a lesser penalty, was amended in 1954 to criminalize concealment of property with intent to evade tax.

2. Whether a statute of limitations defense can be deemed waived where, if the government's evidence were believed, it affirmatively showed that the offenses were completed more than six years before indictment but where no specific jury instruction was requested, the trial court having accepted the government's position that the offenses were "continuing" ones.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

STATUTES INVOLVED.....v

OPINIONS BELOW.....vi

JURISDICTION.....vi

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS, CONSTRUING 26 U.S.C. §7201 TO REACH ATTEMPTED EVASION OF TAXES THROUGH CONCEALMENT OF ASSETS DECIDED AN IMPORTANT QUESTION OF FIRST IMPRESSION -- MISCONTRUING A SUPREME COURT DECISION, MISUNDERSTANDING CONGRESIONAL INTENT, AND CREATING AN ANOMALOUS SITUATION.....6

II. WHETHER A STATUTE OF LIMITATIONS DEFENSE CAN BE DEEMED WAIVED WHERE, IF THE GOVERNMENT'S EVIDENCE WERE BELIEVED, IT AFFIRMATIVELY SHOWED THAT THE OFFENSES WERE COMPLETED MORE THAN SIX YEARS BEFORE INDICTMENT BUT WHERE NO SPECIFIC JURY INSTRUCTION WAS REQUESTED BECAUSE THE TRIAL COURT HAD

SIX YEARS BEFORE INDICTMENT BUT WHERE NO SPECIFIC JURY INSTRUCTION WAS REQUESTED BECAUSE THE TRIAL COURT HAD ACCEPTED THE GOVERNMENT'S ERRONEOUS POSITION THAT THE OFFENSES WERE "CONTINUING" ONES.....15

CONCLUSION.....23

APPENDIX

Opinion of the Court of Appeals affirming the conviction.....A-1

Order denying petition for rehearing and rehearing en banc.....A-19

Order amending order denying petition for rehearing.....A-21

TABLE OF AUTHORITIES

Benes v. United States, 276 F.2d 99 (6th Cir. 1960).....18

Spies v. United States, 317 U.S. 492 (1943).....passim

United States v. Meeker, 701 F.2d 685 (7th Cir.), cert. denied, 104 S.Ct. 96 (1984)..20

United States v. Wild, 551 F.2d 410 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977)..20

Waters v. United States, 328 F.2d 739 (10th Cir. 1964).....19

STATUTES INVOLVED

26 U.S.C. §7201 provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. §7206(4) provides:

Any person who...

Removal or concealment with intent to defraud. Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collecction of any tax imposed by this title;...

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years or both, together with the costs of prosecution.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 781 F.2d 1166 (6th Cir. 1986), and is reproduced in the Appendix at A-1.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 21, 1986. That court denied a petition for rehearing and for rehearing en banc by order dated March 17, 1986. This court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On November 13, 1983 Frank L. Hook was charged with conspiracy to attempt to evade payment of his income tax for the years 1973 through 1980, in violation of 18 U.S.C. §371. In separate counts he was charged, under 26 U.S.C. §7201, with the attempt to evade payment of his taxes for 1975, 1976, 1977, 1978, 1979 and 1980. Following a jury trial, Hook was acquitted on the conspiracy charge, and convicted on two of the substantive counts, those involving the 1976 and 1979 tax years. On the remaining counts, he was convicted of the lesser included offense defined in 26 U.S.C. §7203, willful failure to pay a tax which is a misdemeanor.[1]

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[1]Hook was sentenced to concurrent terms of imprisonment of three years on the felony counts. Imposition of sentence on the remaining counts was suspended, and he was placed on probation for five years.

The government contended that Hook had filed timely tax returns for each of the years in question accurately reporting his taxable income and reporting taxes due. However, Hook failed to pay some or all of the taxes he had reported due and owing. In each substantive count, the indictment charged that the offense occurred on or about the day the return was filed and continued to the date of the indictment. In each count, the means allegedly employed in the attempt to avoid payment were the same: concealment of assets.

On his appeal, Hook argued that his felony convictions were infirm because the statute under which he was charged did not reach his conduct. He urged that the felony offense of attempt to evade payment of taxes, the §7201 offense, cannot be made out where accurate returns are filed and the only affirmative act of evasion is concealment of

assets; that offense is proscribed by 26 U.S.C. §7206(4), which carries a lesser penalty.

Hook also argued that his convictions for tax years 1975 and 1976 (one felony and one misdemeanor) were barred by the six year statute of limitations.

The Court of Appeals, by a vote of 2 to 1, affirmed the conviction. Relying on this Court's decision in Spies v. United States, 317 U.S. 492 (1943), the language of 26 U.S.C. §7201, and a perceived "anomoly" which would arise if a contrary conclusion were reached, the Court of Appeals held that a defendant may be convicted of willful attempt to evade taxes where he has filed timely and accurate returns, based solely on the affirmative act of concealment of assets. The majority also rejected the claim that the 1975 and 1976 offenses were time barred since, in this case,

the jury might have found that those offenses were not complete until a time within the six year limitations period and Hook's failure to request a jury instruction directing the jury's attention to the limitation question precluded him from arguing that the offenses were time barred.

Judge Merritt dissented on the statute of limitations gound. Judge Merritt agreed with the defendant that the government's own proof showed that the offenses were complete more than six years before the indictment was returned. He also recognized that, at the start of the trial, the trial court had adopted the government's erroneous position that the offenses were "continuing offenses" and its claim that the statute therefore did not begin to run until the last act of concealment was complete. Thus, Judge Merritt concluded, the defendant could not be faulted

for not having asked for a jury instruction on a different limitations theory.

POINT I

THE COURT OF APPEALS, CONSTRUING 26 U.S.C. §7201 TO REACH ATTEMPTED EVASION OF TAXES THROUGH CONCEALMENT OF ASSETS, ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FIRST IMPRESSION -- MISCONSTRUING A SUPREME COURT DECISION, MISUNDERSTANDING CONGRESSIONAL INTENT, AND CREATING AN ANOMALOUS SITUATION

Petitioner argued that the conduct he was charged with could not be prosecuted under 26 U.S.C. §7201, because that section does not extend to attempts to evade a tax or its payment where timely, accurate returns were filed and the only "act of evasion" was concealment of assets. Section 7206(4), not §7201, expressly criminalizes that conduct. The Court of Appeals ruled otherwise. While realizing that the question had never before been addressed by any court, the majority rejected the defendant's contention, relying on the "plain language" of §7201, this Court's

decision in Spies v. United States, 317 U.S. 492 (1943), Congressional intent in amending §7206(4), and the "anomalous result" which would be produced if the Court were to rule that §7206(4) provides the exclusive remedy for concealment of assets. Petitioner respectfully submits that the decision of the Sixth Circuit miscontrues §7201 and the Spies decision, misapprehends §7206(4)'s legislative history, nullifies the 1954 amendment of §7206(4), and leads to a result much more anomalous than that which the Court feared would arise by a contrary ruling. Moreover, it upsets the delicate statutory framework of criminal penalties established in the Internal Revenue Code. If permitted to stand, the ruling may create serious anomolies and injustices in the enforcement of the penal provisions of the Code.

Section 7201 makes it a felony to willfully attempt "in any manner" to evade a tax or its payment, but that language, while broad and general, is anything but "plain." Indeed, it was precisely a question of the statute's construction that was before this Court in Spies v. United States, 317 U.S. 492 (1943).

In Spies, the defendant admitted that he had sufficient income in the year in question to place him under a statutory duty to file a return and to pay a tax, and that he had done neither. He claimed that a willful failure to file a return and a willful failure to pay, without more, constituted only the two misdemeanors of failure to file and failure to pay under §145(a), the predecessor of §7203, and not the felony of attempt to defeat or evade a tax under §145(b), §7201's predecessor. This Court agreed and held that

conviction of the more serious felony requires more than willful neglect of the statutory duties. It requires, in addition, one or more affirmative acts of attempted evasion. Illustrating the type of conduct which could elevate a failure to file a tax return and to pay a tax to the more serious felony offense, the Court listed

> conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income...

In this case, the government seized upon the "concealment of assets" language in Spies to argue that concealment of assets is conduct that this Court expressly found to be an "affirmative act of evasion." The government -- and now the Sixth Circuit -- entirely overlooked the fact that Spies was itself a

decision limiting the reach of §7201 (notwithstanding that statute's "in any manner" language) by requiring more than a failure to file a return and a willful failure to pay the tax, both tax crimes in their own right, to establish the most serious felony tax offense.[2]

Moreover, the majority's opinion is based on taking out of context the phrase "concealment of assets" as used by the Spies Court. Spies was a failure to file case. The types of affirmative acts of evasion, including concealment of assets to which this Court adverted, were all acts which aggravated the interference with the assessment of tax

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[2]In the instant case, the most which was shown was a willful failure to pay the tax and concealment of assets -- both separate crimes under the tax code and under the Spies rationale, not enough to establish the §7201 felony offense.

which a failure to file creates.[3] Thus, it is only in the context of a failure to file, or perhaps, the filing of a return falsely underreporting taxable income or taxes due, that concealment aggravates the wrongdoing and constitutes an "affirmative act of evasion." In a case such as this one, where taxes due were reported accurately, concealment of assets simply does not aggrevate the crime.

In any event, to the extent that there are any doubts as to §7201's reach, the existence of 26 U.S.C. §7206(4) establishes that §7201 does not extend to concealment of

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[3]Each of the acts on the Spies list acts to make the assessment of the tax difficult or impossible. Keeping a double set of books, making false entries in books or altering them, creating false invoices or documents, destroying books or records -- all are devices which can be used to hide the existence of taxable income. So are concealment of assets, covering up sources of income, and handling one's affairs to avoid making the records which are usual in transactions of the kind. All are devices used to conceal the existence and amount of taxable income. All thus aggravate the non-filing.

assets. Section 7206(4) provides that "any person who ... conceals ... any property upon which levy is authorized ... with intent to evade or defeat the assessment or collection of any tax ... shall be guilty of a felony." Prior to 1954, §7206(4)'s predecessor, §3321(a) of the 1939 Code, proscribed only concealment of goods or commodities, like liquor, on which a tax was imposed. The majority opinion rejects the view that since §7206(4), as amended in 1954, criminalizes concealment of assets subject to levy and renders that conduct subject to a lesser penalty, that §7201 does not cover that conduct. But the majority never came to grips with the fact that, if concealment of assets can make out the §7201 offense, then there was no reason at all for Congress to go out of its way to amend §7206(4) to criminalize such conduct. The amendment of §7206(4) was

entirely pointless. Under the government's -- and now the Sixth Circuit's -- view, §7201 is a lesser included offense of §7206(4), although it is §7201 which carries the higher penalty. The majority never attempts to explain why Congress amended §7206(4) or why, if its construction is correct, any rational prosecutor would ever choose to proceed under §7206(4) which requires proof of the same elements as required for a §7201 prosecution and more, and which, moreover, promises a lesser maximum penalty even if proved.

Instead, the court focused on the perceived anomaly that any other construction of §7201 would preclude felony prosecutions against those taxpayers who had the foresight to file accurate tax returns and commit acts of concealment of assets prior to assessment, notice and demand, while permitting prosecution only of those taxpayers who wait

for the IRS to act before committing their acts of concealment. But the anomaly perceived by the panel is much more tolerable than the anomaly otherwise created -- that Congress, in 1954, amended a statute to criminalize conduct already made criminal -- and already subject to a more severe penalty -- under §7201.

Neither the Petitioner's nor the Sixth Circuit's analysis solves the entire statutory puzzle which is the Internal Revenue Code. But the construction proffered by the Petitioner results in a much closer fit than the alternative. Criminal statutes should be strictly construed. Any doubts as to the statute's reach -- and there must surely be doubts -- should have been resolved in favor of the defendant. If is now appropriate for this Court, finally, to resolve the ambiguity.

POINT II

WHETHER A STATUTE OF LIMITATIONS DEFENSE CAN BE DEEMED WAIVED WHERE, IF THE GOVERNMENT'S EVIDENCE WERE BELIEVED, IT AFFIRMATIVELY SHOWED THAT THE OFFENSES WERE COMPLETED MORE THAN SIX YEARS BEFORE INDICTMENT BUT WHERE NO SPECIFIC JURY INSTRUCTION WAS REQUESTED BECAUSE THE TRIAL COURT HAD ACCEPTED THE GOVERNMENT'S ERRONEOUS POSITION THAT THE OFFENSES WERE "CONTINUING" ONES

There is a split in the Circuits concerning whether, and under what circumstances a statute of limitations defense will be deemed waived. This case raises those important questions. In addition, because the govenment's proof, if believed, affirmatively showed that the offenses were barred by the applicable statute of limitations, and because the record shows that a request for a jury instruction would have been in vain because

the court had earlier ruled that the offenses were "continuing" ones, the convictions here constitute a manifest miscarriage of justice.

Petitioner seeks review in this Court of his conviction for willful failure to pay tax for the calendar year 1975 (Count 2; §7203 lesser included offense) and for willful attempt to evade the payment of taxes for calendar year 1976 (Count 3; §7201) because the government's own proof demonstrated that the offenses, if committed at all, were complete more than six years -- the limitation period -- prior to indictment. Early in the poceedings, the government had taken the position that the offenses were "continuing" ones and that, while its proof showed significant acts of concealment (i.e., affirmative acts of evasion) in 1975 and early 1976, the limitations period for the crime of attempting to evade payment of taxes would not

begin to run until the defendant's last affirmative act of evasion. The trial court apparently agreed.

No specific jury instruction on the statute of limitations question was requested or given.

On appeal, Petitioner argued that these tax offenses were not "continuing" ones for statute of limitation purposes; that the government's own evidence showed that the prosecution was time barred; and that, under the jury instruction given, the jury must have concluded that the offenses were complete at a time more than six years before indictment. He argued as well that his failure to raise the precise issue in the trial court by requesting a jury instruction specifically tailored to the statute of limitation question was of moment: in the Sixth Circuit, at least, under Benes v. United States, 276 F.2d 99,

108-09 (6th Cir. 1960), the running of the statute of limitations is a jurisdictional defect which can by raised at any time.

The majority of the Sixth Circuit panel rejected the Petitioner's argument. It apparently rejected the continuing offense theory but it noted that, while the government's proof did include evidence from which the jury could have concluded that the offenses were complete more than six years before indictment, the facts did not compel that conclusion. The majority also ruled that the omission of statute of limitation instructions merely created a situation in which the jury could have convicted Hook while finding that the crimes occurred more than six years before indictment. The majority suggested that by failing to request a specific instruction, Petitioner had waived his statute of limitations defense.

The dissent disagreed with the entire analysis.

This case thus raises important and difficult questions about when the statute of limitations begins to run on the Code's tax crimes. It raises, in addition, questions about the nature of a statute of limitations defense -- whether it is an affirmative defense which is waived if not raised or whether, under Sixth Circuit and Tenth Circuit precedent, it is jurisdictional and noticeable for the first time on appeal.[4]

Finally, it raises substantial questions about the circumstances under which a statute of limitations defense will be deemed waived, a matter as to which the federal courts differ.

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[4]See Waters v. United States, 328 F.2d 739 (10th Cir. 1964); Benes v. United States, 276 F.2d 99 (6th Cir. 1960).

Even in those Circuits where a statute of limitations defense is deemed waivable, courts do not lightly find it to have been waived. For example, in United States v. Meeker, 701 F.2d 685 (7th Cir.), cert. denied, 104 S.Ct. 96 (1983), a case cited by the Sixth Circuit majority, the waiver was a signed one which secured an advantage to the defendant and which was executed on advice of counsel. Meeker, in turn, relied upon United States v. Wild, 551 F.2d 410 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977), where the defendant, who was represented by Edward Bennett Williams, executed a waiver on counsel's advice in the hope that he could reach a plea bargain and avoid indictment. Wild's holding was a limited one: where the defendant followed the advice of competent counsel and executed an

express written waiver prior to the expiration of the statute of limitations, the district court was not with jurisdiction to try him.

In this case, the Sixth Circuit has held that failure to request a specific statute of limitations instruction barred consideration of the statute of limitations claim on appeal even though, by apparently adopting the prosecutor's continuing offense theory the trial court had, erroneously, made a legal ruling which eliminated the defense; even though the government's own view of the evidence affirmatively showed that, unless the offenses were continuing ones, the prosecution was time barred; and even though there was no conceivable tactical reason for waiving the defense.

Because these are all important and issues which arise in the federal courts with some frequency, and because the resolution of

these issues by the Court of Appeals has worked a manifest miscarriage of justice, this Court should grant the writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this court grant a writ of certiorari.

Respectfully submitted,

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Dated: May 13, 1986

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 84-3815

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK L. HOOK,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 21, 1986

Before: MERRITT and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

CELEBREEZE, Senior Circuit Judge, delivered the opinion of the Court, in which WELLFORD, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 14-18) delivered a separate dissenting opinion.

CELEBREZZE, Senior Circuit Judge. Defendant-appellant Frank L. Hook appeals from his convictions of two counts of feloniously attempting to evade the payment of income taxes, in violation of I.R.C. § 7201 (1982), and four counts of willfully failing to pay income taxes, in contravention of I.R.C. § 7203 (1982). On appeal, Hook contends that the felony convictions must be set aside because he was charged

under the wrong statute, that his convictions relating to the 1975 and 1976 tax years are barred by the statute of limitations, that the evidence presented at trial was insufficient to support his felony convictions, and that the trial court erred in admitting prejudicial evidence and in permitting his ex-wife to testify to acts which occurred during their marriage. After carefully reviewing each issue, we affirm.

Viewing the facts in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), Hook engaged in the following conduct to conceal assets from the Internal Revenue Service (IRS). In 1975, Hook formed a corporation whose sole assets were 10,000 shares of Wendy's International stock and two automobiles. Although the only shareholders of the corporation were his wife and daughters, the money to purchase these assets came from Hook, and in May, 1977, after the sale of the Wendy's stock, Hook received the bulk of the proceeds. Similarly, Hook purchased a home in 1977 in the name of his girlfriend, Linda Barford, who lived there for only six months. Hook himself lived there from 1979 until the summer of 1983, paid the installments on the mortgage note, made substantial improvements to the property, and obtained the proceeds from the sale of the house.

While Hook maintained no bank accounts and possessed no credit cards in his own name, he was still involved in numerous financial transactions. Without completing required currency transaction reports, Hook cashed checks, sometimes made out to fictitious payees, totalling in excess of $1.2 million through a neighborhood grocery, Linden Market, and a neighborhood branch bank. Throughout the period covered by the indictment, Hook used credit cards in the names of others to purchase heating oil, obtain car rentals, and make personal expenditures, and used automobiles titled in other persons' names. Finally, Hook employed cash to pay for everything from legal fees to swimming pools.

Hook filed timely and accurate tax returns with the IRS for the 1975 through 1980 tax years showing a total of almost $300,000 in taxes due, but paid only a few thousand dollars in satisfaction of this liability. Although the IRS made repeated demands and attached liens to Hook's property, the Government was generally unsuccessful in locating assets belonging to Hook. The Government subsequently obtained an indictment against Hook on November 16, 1983. Count I charged Frank Hook, his ex-wife Nancy Hook, and the proprietor of Linden Market with conspiring to evade the payment of income taxes for the years 1973 through 1980. Counts II through VII charged Frank and Nancy Hook with attempting to evade the payment of income taxes for each of the tax years 1975 through 1980, in violation of Section 7201.

Frank Hook's co-defendants were severed before trial and the Government proceeded solely against him. After a lengthy jury trial, Hook was acquitted on the conspiracy count, convicted under counts III and VI of feloniously attempting to evade the payment of income taxes for the tax years 1976 and 1979, and convicted on the remaining four counts of the lesser-included misdemeanor offense of willfully failing to pay income taxes for the tax years 1975, 1977, 1978, and 1980. This appeal ensued.

Hook first argues that his two felony convictions must be reversed because he was charged and convicted under the wrong statute. This argument focuses on the interpretation of two statutes. Section 7201, which states in the pertinent part, "Any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof shall . . . be guilty of a felony . . .." I.R.C. § 7201 (1982), and Section 7206(4) which provides,

> *Any person who* . . . [r]emoves, deposits, or *conceals* . . . any goods or commodities for or in respect whereof any tax is or shall be imposed, or *any property upon which levy is authorized by Section 6331,*

> with intent to evade or defeat the assessment or collection of any tax . . . shall be guilty of a felony. . ..

I.R.C. § 7206(4) (1982) (emphasis added). Hook alleges that the Section 7201 language "attempts in any manner to evade or defeat . . . the payment" of a tax does not encompass conduct which goes solely to concealing assets. According to Hook, the attempt to avoid the payment of taxes through the concealment of assets can only be prosecuted under Section 7201 if the taxpayer also files a fraudulent return or otherwise attempts to conceal the existence or amount of taxable income. Hook buttresses this assertion by pointing out that Section 7206(4) explicitly refers to concealment and by arguing that an interpretation of Section 7201 to cover concealment would implicitly attribute irrational conduct to Congress in amending Section 7206(4) to criminalize concealment activity which would have already been provided for in Section 7201. We disagree.

Initially, Hook's argument that the sole act of concealing assets is not included within the purview of Section 7201 is contrary to the plain language of that statute which establishes a violation if anyone "willfully attempts *in any manner*" to evade a tax or its payment. I.R.C. § 7201 (1982) (emphasis added). The Supreme Court, in *Spies v. United States*, 317 U.S. 492, 499 (1943), interpreted Section 7201 to subsume several affirmative acts, including "concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." The Court cautioned that its list of affirmative acts was illustrative only, and not limiting, lest it be interpreted as restricting the undefined and unlimited acts which Congress intended to criminalize under Section 7201 by the use of the "in any manner" language. *Spies*, 317 U.S. at 499. Although *Spies* was a case involving both the non-filing of a tax return as well as non-payment of the tax, we find nothing in the case that either lends itself to the

conclusion that the Court was restricting its decision to only the non-filing conduct of the taxpayer or precludes application of the Court's list of affirmative acts to cases involving the evasion of payment.[1] Accordingly, we conclude that Hook's argument runs contrary to both the plain language and the Supreme Court's interpretation of Section 7201.

Next, we do not believe that the 1954 amendment to Section 7206(4), making it an offense to conceal property on which levy is authorized as well as conceal goods or commodities on which a tax is or shall be imposed, evidences a Congressional intent that concealment of assets, as an act of tax evasion, be solely remedied by Section 7206(4). Contrary to Hook's assertions, nothing in the legislative history indicates that Congress in amending Section 7206(4) intended to limit the scope of Section 7201 or believed that the amendment was necessary to fill a gap left open by Section 7201. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A425, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4025, 4573; S. Rep. No. 1622, 83d Cong., 2d Sess. 603, *reprinted in* 1954 U.S. Code Cong.

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[1]In addition to *Spies*, Hook attempted to likewise distinguish the many cases pointed to by the Government which involved prosecution under Section 7201 and the concealment of assets by correctly noting that the cases also involved either allegations of fraudulent filing or non-filing of returns, *see, e.g., United States v. Voorhies*, 658 F.2d 710, 712 (9th Cir. 1981); *Cohen v. United States*, 297 F.2d 760 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962), or making false statements to the Government, *see, e.g., United States v. England*, 229 F. Supp. 493 (E.D. Ill. 1964), *rev'd on other grounds*, 347 F.2d 425 (7th Cir. 1965), or merely assumed that concealment comprised a Section 7201 violation on the way to determining other issues, *see, e.g., United States v. Chagra*, 754 F.2d 1181, 1182 (5th Cir. 1985) (evidentiary issue); *Cohen v. United States*, 297 F.2d 760 (9th Cir.) (numerous issues), *cert. denied*, 369 U.S. 865 (1962); *United States v. Shorter*, 608 F. Supp. 871 (D.D.C. 1985) (denial of motion to dismiss indictment alleged to be duplicitous); *United States v. Carpenter*, 175 F. Supp. 362 (N.D. Ga. 1959) (refused to dismiss indictment alleged to lack specificity). This Court has not been directed to a case, and none could be found, which addressed the precise question posed in this appeal.

& Ad. News 4629, 5252. Rather, the clear import of the amendment is to preserve the property of delinquent taxpayers so that the government can collect taxes due. S. Rep. No. 1622, 83d Cong., 2d Sess. 603, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4629, 5252 ("This section . . . covers such offenses committed in order to avoid levy. . . ."). Considered in this light, Congress in amending Section 7206(4) was not filling an existing gap in the law or impliedly repealing Section 7201, *see Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193 (1968) (repeals by implication disfavored), but was merely strengthening a collection provision.

Finally, we believe that a holding that Section 7206(4) provides the exclusive remedy for concealment of assets would produce an anomalous result. This Court has held that Section 7206(4) is operative only if the acts of concealment take place after the conditions precedent of assessment, notice and demand, and neglect or refusal to pay the tax, necessary for the authorization of a levy under Section 6331,[2] have been met. *United States v. Swarthout*, 420 F.2d 831, 833 (6th Cir. 1970). To adopt Hook's contention concerning the purview of Sections 7201 and 7206(4) would thus preclude felony prosecutions against those taxpayers who had the foresight to file accurate tax returns and commit acts of concealment of assets prior to assessment, notice and demand, and refusal or neglect, while permitting prosecution only of those taxpayers who wait for the IRS to act before committing their acts of concealment.[3] After carefully examining the statutes at

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[2]Section 6331 provides: "If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful . . . to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . ." I.R.C. § 6331 (1982).

[3]Since Hook was prosecuted under Section 7201 and not Section 7206(4), the record on appeal is unclear as to whether the prerequisites to prosecution under Section 7206(4) were even met in the instant case.

issue, we find that concealment of assets alone can constitute an offense under Section 7201 for the evasion of payment of income taxes and, accordingly, we hold that Hook was charged under the proper statute.

Hook's second contention is that his Section 7201 felony conviction under count II and his conviction under count III of the lesser-included misdemeanor offense of willfully failing to pay a tax, in violation of Section 7203, are both barred by the statute of limitations. Specifically, Hook alleges that a review of the evidence and the jury instructions demonstrates that the jury found the elements of the Section 7201 and Section 7203 crimes[4] to have first appeared prior to November 16, 1977.[5] Alternatively, Hook argues that since the jury was never apprised of the statutory limitations period or asked to determine when the crimes were completed, a possibility arises that the jury may have convicted him on the basis of acts which occurred outside the limitations period, which he contends requires reversal of his count II and count III convictions.

In support of his argument that the jury determined that the elements of the Section 7201 and Section 7203 crimes first appeared prior to November 16, 1977, Hook relies upon those jury instructions which stated that the Government must prove beyond a reasonable doubt with respect to the particular count under consideration "that the offense

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[4]The three elements of a Section 7201 violation are a tax deficiency, willfulness, and an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351 (1965). The affirmative act requirement distinguishes this felony from the Section 7203 misdemeanor offense. *Spies v. United States*, 317 U.S. 492, 499 (1943).

[5]The statute of limitations applicable to both Sections 7201 and 7203 is six years. *See* I.R.C. § 6531 (1982). Since the indictment was returned on November 16, 1983, the crimes contemplated by Hook's count II and count III convictions must have occurred after November 16, 1977 to be within the limitations period.

charged occurred on or about the date alleged" in the indictment. The instructions , according to Hook, effectively directed the jury's attention to the period of time on or about the dates in the indictment which reflect the dates on which he filed the tax returns, April 15, 1976 for count II and June 6, 1977 for count III. Hook also points out that the most damaging evidence offered against him at trial consisted of the formation of the "shell" corporation and the purchase of the house in the name of Linda Barford, both of which occurred prior to November 16, 1977. Interpreting the jury instructions as a whole, *Cincinnati Fluid Power, Inc. v. Rexnord, Inc.*, 773 F.2d 92, 95 (6th Cir. 1985) (per curiam), however, we are not persuaded that the jury instructions concentrated the jury's attention on times outside the limitations period.

First, the jury charges for each count tracked the language of the indictment, which charged Hook with violating Section 7201 on or about certain dates (each of counts II through VII reciting a different date) and "*continuing up to and including the date of the indictment.*" (emphasis added). Similarly, with regard to the willfulness element of Sections 7201 and 7203, the trial court instructed the jury that it was "entitled to consider any statements made and acts done or not done by Defendant, and all the facts and circumstances in evidence that may aid in the jury's determination of the state of mind of the Defendant." These instructions directed the jury's attention more to a period of time beginning with the date mentioned and ending with the date of the indictment than to the specific date recited in any of the individual counts. Furthermore, even if the jury's attention was directed to the specific dates contained in counts II and III of the indictment, we find nothing which impressed upon the jury any requirement that it find all of the elements of the crimes to have occurred on or about the dates alleged.[6] Next, massive amounts of evidence and testimony concerning conduct by

[6] *See infra* footnote 9.

Hook to conceal assets was presented in this case with little apparent attempt to relate specific acts to specific counts in the indictment, let alone to specific dates within the various counts. The indictment, although reciting forty-three overt acts under the conspiracy count, provided no lists of acts to which the jury could refer in rendering the verdicts under counts II through VII, and nothing has been brought to our attention, apart from some income and expenditures evidence, which indicates that either the Government or Hook attempted to limit the jury's consideration of the evidence to particular periods of time. Last, although we recognize that what appears to be the most damaging evidence against Hook was conduct which occurred outside the limitations period, other evidence showed numerous acts by Hook occurring within the limitations period which could have been employed by the jury to conclude that the Section 7201 and Section 7203 crimes for which Hook was convicted were not complete until after November 16, 1977.

Based upon the foregoing, we cannot say that the jury instructions and evidence in this case were sufficient to concentrate the jury's attention on the April 15, 1976 and June 6, 1977 dates suggested by Hook. Accordingly, we reject Hook's argument that the jury instructions, in this case, required the jury to find Hook guilty based upon acts which occurred outside of the limitations period.

In the alternative, Hook maintains that a review of the jury instructions and evidence clearly indicates that a possibility exists that he was convicted under counts II and III on the basis of evidence wholly outside the statute of limitations period. According to Hook, this possibility alone warrants reversal.[7] Since this possibility only arose because the jury

[7]At oral argument, Hook relied upon *Robinson* v. *California*, 370 U.S. 660, 665 (1962), for the proposition that reversal is required if a jury could have based its conviction on either a permissible or impermissible ground and it is impossible to tell from the verdict upon which

was not instructed regarding the applicable limitations period or asked to determine when the crimes under counts II and III were completed, Hook's argument is really an objection to the trial court's omission of jury instructions on these matters. Hence, we consider the adequacy of the jury charges.

Since Hook failed to object to the jury instructions at trial,[8]

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ground the jury relied. Although numerous other cases can be cited for this proposition, notably *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931), the proposition is inapplicable to the case at bar. Two rules have been derived from the *Stromberg* line of cases. One rule requires "that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground," and the other requires reversal when a "general verdict on a single-count indictment or information rest[s] on *both* a constitutional and an unconstitutional ground." *Zant* v. *Stephens*, 462 U.S. 862, 881-82 (1983) (emphasis in original). Neither of these rules was violated in the present case: alternative independent grounds were not presented to the jury and Hook does not claim that the jury's general verdict rested upon both constitutional and unconstitutional grounds.

[8]Hook has attempted to excuse his failure to raise the statute of limitations matter at the jury instruction stage of trial by pointing out that the district court, in a pre-trial motion for dismissal made by Nancy Hook before her severance, held that the statute of limitations began when the last affirmative act was completed. The enunciation of the trial court's position in denying Nancy Hook's pre-trial motion, however, did not excuse Frank Hook from objecting to the jury instructions as given or requesting instructions clarifying the statute of limitations matter for the jury, thereby avoiding the problem of which he now complains. A trial counsel is responsible for requesting appropriate jury instructions and objecting to erroneous ones. Objections to jury instructions are necessary to afford the trial judge the opportunity to correct mistakes in his charge. *See, e.g., United States* v. *Hamilton*, 684 F.2d 380, 385 (6th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States* v. *Parisien*, 574 F.2d 974, 976 (8th Cir.) (per curiam), *cert. denied*, 439 U.S. 850 (1978). Trial counsel, as well as the court, is expected to know the law of the case he is trying. *See Sica* v. *United States*, 325 F.2d 831, 836 (9th Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

see Fed. R. Crim. P. 30, reversal is only required in this case if the omission of jury instructions constituted "plain error." Fed. R. Crim. P. 52(b). The Supreme Court and numerous federal courts have repeatedly stated that the plain error doctrine is to be used sparingly, *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982); *United States v. Byers*, 740 F.2d 1104, 1126-27 & n.22 (D.C. Cir. 1984) (citing cases), only in exceptional circumstances, *United States v. Atkinson*, 297 U.S. 157, 160 (1936); *Byers*, 740 F.2d at 1127 & n.23 (citing cases); *United States v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir. 1971), and solely to avoid a miscarriage of justice, *Frady*, 456 U.S. at 163 & n. 14; *Rudinsky*, 439 F.2d at 1076. Recourse may be had to the doctrine "only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it." *Frady*, 456 U.S. at 163. Moreover, an improper jury instruction will rarely justify reversal of a criminal conviction when no objection has been made at trial, *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977), and an omitted or incomplete instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law, *Kibbe*, 431 U.S. at 155.

Judged by these standards, no plain error occurred with regard to the jury charges. Hook argued at trial that the statute of limitations began to run when his tax returns were filed or when the returns were due, whichever was later. The Government has argued at trial, and on appeal, that the statute begins to run when the last affirmative act constituting the crime of tax evasion or willful non-payment is completed. The trial court appears to have operated at trial under the Government's theory but denied Hook's motion for acquittal while announcing the view, accepted by Hook on appeal, that the limitation period begins when the elements of the crime first appear.[9] Given the total lack of agreement and the uncer-

[9]Since Hook has accepted the district court's post-verdict determination concerning the running of the limitations period and his argument

tainty that apparently existed at trial over the very operation of the statute of limitations in this case, we cannot say that the failure of the district court to give jury instructions concerning the statute of limitations was an error so obvious that it constituted plain error. Furthermore, the trial court's alleged error was an act of omission, not commission; the lower court did not misstate the law or direct the jury to convict Hook even if it found the crimes to have been completed before the limitations period. The omission of statute of limitations instructions merely created a situation in which the jury could have convicted Hook while finding that the crimes occurred before November 16, 1977, a possibility we find too speculative to require reversal based on plain error. *See Kibbe*, 431 U.S. at 157; *Continental Baking Co. v. United States*, 281 F.2d 137, 155 (6th Cir. 1960). Since we cannot find reversible error in the jury instructions, we hold that Hook's convictions are not barred by the statute of limitations.[10]

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that the convictions are time-barred fails even if we also accept, for purposes of this appeal, that the limitations period begins to run on these crimes when the elements first appear, we express no opinion concerning the Government's notion that evasion of taxes by nonpayment and concealment of assets constitutes a continuing offense for which, much like a conspiracy, the statute of limitations begins to run with the last affirmative act in furtherance of the crime.

[10]Due to our disposition of this case, it was unnecessary for us to consider, and we express no opinion concerning, the precedential value of *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960), which presumably stands for the proposition that a statute of limitations acts as a non-waivable jurisdictional bar. An obvious consequence of our holding, however, is to place on the defendant the responsibility of clarifying statute of limitations matters for the jury in order to avoid the possibility of convictions for what may be time-barred crimes or, at least, of making a timely objection to incomplete or erroneous jury charges on the subject. We do not believe this is an unduly harsh or burdensome requirement to place on a criminal defendant in light of the fact that some circuits have held that criminal statutes of limitation

In light of the foregoing,[11] the judgment of the district court is affirmed.

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are affirmative defenses which are waived if not raised at trial. *United States v. Meeker*, 701 F.2d 685, 687-88 (7th Cir.) (citing cases), *cert. denied*, 464 U.S. 826 (1983). Our holding also reduces the possibility that a criminal defendant will rely on ambiguous or incomplete jury instructions regarding the statute of limitations and appeal only if the jury verdict is adverse. *See Industrial Development Board of the Town of Section, Alabama v. Fuqua Industries, Inc.*, 523 F.2d 1226, 1238 (5th Cir. 1975).

[11]Hook makes three additional challenges to his convictions. After carefully reviewing these contentions, we find each to be without merit. First, we reject Hook's allegation that the evidence at trial was insufficient to support his felony convictions. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Stone*, 748 F.2d 361, 363 (6th Cir. 1984). Next, we find Hook's contention that the trial court abused its discretion by admitting prejudicial evidence in violation of Rule 403 of the Federal Rules of Evidence to be without merit. *See United States v. Brady*, 595 F.2d 359, 361 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979); *United States v. Jenkins*, 525 F.2d 819, 824 (6th Cir. 1975) (per curiam). Finally, we reject Hook's contention that acts of giving his wife money to pay household bills were communicative acts protected by the federal common law privilege for confidential marital communications. *See United States v. Robinson*, 763 F.2d 778, 783 (6th Cir. 1985).

MERRITT, Circuit Judge, dissenting. The government's theory in this criminal tax case is that although the defendant filed timely nonfraudulent personal income tax returns for the six calendar years from 1975 through 1980, he is guilty of the felony of evading *payment* of the taxes due for each of those years through affirmative acts of concealment of assets in violation of section 7201, as well as committing the lesser included misdemeanor of willfully failing to pay taxes in violation of section 7203. The jury convicted him of the section 7201 felony offenses for the years 1976 and 1979 and of the section 7203 misdemeanor offenses for 1975, 1977, 1978 and 1980. Thus, the jury found him guilty of affirmative acts of concealment in only two of the years. It convicted him of wrongful failure to pay for the other four years.

Since the statute of limitations is six years, 26 U.S.C. § 6531, and the indictment was not filed until November 13, 1983 (making the cutoff date November 13, 1977), the government has a statute of limitations problem for the years 1975 and 1976. This statute of limitations problem arises for these years because, under the general rule, the statute begins to run on the date the offense is first committed, *i.e.*, whenever acts of affirmative concealment or willful nonpayment occur after the April 15 due date. The government's problem is that it claimed, and proof strongly suggested, that the acts of concealment and willfulness triggering the running of the statute for the 1975 and 1976 tax years occurred prior to November 1977.

In order to extricate itself from this dilemma the government adopted a "continuing offense" theory. Since its proof suggested that the acts of concealment and willfulness continued up until the date of the indictment in 1983, the government argued that the statute was tolled during the period of continuation and that the limitations period accrued and began to run only upon the occurrence of the last of the acts of concealment or willfulness committed in connection with the continuing offenses.

The government and the defendant agree that the District Court adopted this "continuing offense" position before and throughout the trial and kept the years 1975 and 1976 in the case. In its February 27, 1984, pretrial Memorandum and Order denying motions to dismiss, the District Court stated that: "the six-year limitations period imposed by 26 U.S.C. § 6531(2) for evasion of the payment of taxes runs from the last affirmative act constituting the attempt to evade payment."

Upon motion for acquittal, after the jury convicted the defendant for these two years, the District Court found the continuing offense theory inapplicable. But the Court refused to set the verdicts aside. It did not conclude that the defendant had waived the statute of limitations. It reached the conclusion on the merits (accepted as sound by the majority here) that the statute had not run on the 1975 and 1976 counts because "there was sufficient evidence to support a finding that all elements of the [1975 and 1976] offenses upon which defendant was convicted came into existence some time after the commencement of the six year limitations period." (App. 56.) Or, in the words of the majority, wrongful acts after November, 1977 "could have been employed by the jury to conclude" that the statute did not begin to run earlier. (*Supra* p. 9.) I believe that both the government and the defendant are correct in their contention that the 1975 and 1976 offenses were committed, if at all, earlier than November, 1977 and hence that the statute has run against those two counts.

Both the government and the defendant disagree with the approach to the problem taken by the District Court and now by our Court. The government, adhering to its continuing offense tolling argument, contends that the District Court "reached the right result for the wrong reason." The defendant argues on this point as follows:

> This approach, however, which would have been appropriate if the limitations questions had been put

> to the jury, was not appropriate where the jury was not advised that the date of any of the events in issue was of any moment. The jurors were never asked to determine when the defendant's conduct became willful or when the affirmative act of evasion occurred. And there is no reason to assume that they made determinations which they were never instructed to make.

Appellant's Brief, p. 32.

The defendant's argument on this point seems correct. The jury was not asked to decide facts regarding the running of the statute of limitations because the parties thought that the court had adopted the government's continuing offense theory. The jury did not explicitly or implicitly find any facts relevant to this issue. Again, it should be emphasized that neither side asked for jury instructions on this issue, apparently because they thought the District Court had adopted the government's continuing offense theory. It is difficult for me to see how under these circumstances the defendant should be held to have waived the statute by not asking for jury instructions.[1]

It seems to me then that the question becomes whether the government is correct in its continuing offense argument; namely, that the "statute begins to run from the last affirmative act of evasion." Government's brief, pp. 29-30.

The Supreme Court set out the governing considerations on this issue in *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). We must find that "the explicit language of the sub-

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[1]If it is true that the defendant's lawyer waived a good statute of limitations defense, then I do not see why he would not win a § 2255 case for ineffective assistance of counsel. The waiver was highly prejudicial, causing the defendant to be convicted of at least two offenses for which he should have been exonerated. I think it would be much better to come to grips with the problem now and order a new trial rather than to deal with it later in a post conviction proceeding.

stantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* at 115.

The language of sections 7201 and 7203 does not compel such a conclusion. It seems more consistent with Congressional intent and good policy in tax cases to run the statute of limitations from the date of the commission of the offense, as the traditional rule requires, rather than the date of the last act related to the offense. Otherwise acts of concealment of assets or willfulness committed decades after the first wrongful tax acts would revive or extend criminal liability.

The Supreme Court has, on several occasions, reaffirmed "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose.' " It has also said that "[s]tatutes of limitations normally begin to run when the crime is complete." *Toussie*, at 115.

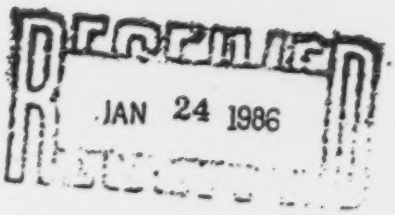
Therefore, I would hold that the statute had run on the years 1975 and 1976 and that these counts should have been dismissed. The remaining question is whether we should simply knock out the counts relating to these years and affirm the other convictions, or remand for a new trial on the other counts. The majority opinion points out that:

> [M]assive amounts of evidence and testimony concerning conduct by Hook to conceal assets was presented in this case with little apparent attempt to relate specific acts to specific counts in the indictment, let alone to specific dates within the various counts. The indictment, although reciting forty-three overt acts under the conspiracy count, provided no lists of acts to which the jury could refer in rendering the verdicts under counts II through VII, and nothing has been brought to our attention, apart from some income and expenditures evidence, which indicates that either the Government or Hook

> attempted to limit the jury's consideration of the evidence to particular periods of time.

Op. at 8-9.

I assume from this statement that the majority, had it decided otherwise on the limitations question, would have concluded that a remand for a new trial is necessary so that the case can be restructured for presentation to the jury. Although the evidence on the other counts of the indictment is strong and presents a record unsympathetic to the defendant, I am unable to say that the errors discussed above were harmless under Rule 52, Fed. R. Crim. P.



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NO. 84-3815

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,:

Plaintiff-Appellee, :

ORDER

-v- :

FRANK L. HOOK, :

Defendant-Appellant :

BEFORE: MERRITT and WELLFORD, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of the Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

No. 84-3815

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,:

Plaintiff-Appellee, :

ORDER

-v- :

FRANK L. HOOK, :

Defendant-Appellant :

Upon consideration, it is ORDERED that the order filed March 17, 1986 denying the petition for rehearing en banc in this case be amended to add the following:

"WELLFORD, J. CONCURRING: To my knowledge, Mr. Dershowitz has never appeared before me and has never been involved in any proceedings before me in my fifteen years as a District Judge or as a Circuit Judge prior to this case. I have no recollection of having previously read his published criticism about my part in a trial which took place some ten

years ago in Memphis, but it is clear that Mr. Dershowitz was not then involved in any way in that jury trial.

"Mr. Dershowitz himself acknowledges that he did not request my recusal at the oral hearing and made no suggestion whatever about any alleged problem with my participating until after the decision in this case, adverse to his client, was filed. He acknowledges that his contention now made in a petition for rehearing "may seem belated." (Appellant's Petition, p.6). Mr. Dershowitz states that at the time of the argument he "did not even know precisely what it is that he had previously written." (Petition, pp.4-5). If Mr. Dershowitz did not know what he wrote, then I knew even less than he since I do not recall having read the article. (I was aware that Mr. Dershowitz had participated in a number of first amendment cases and that he has publicly

expressed strong views with respect to pornography prosecutions, but this had absolutely nothing to do with the case at hand.)

"Mr. Dershowitz makes reference to 28 U.S.C. §455. During the consideration of an decision in this case, I had no notion that my impartiality right was questioned by the defendant, Mr. Hook, or by his counsel, and I perceived no appearance of impartiality. I entertained then and entertain now no personal bias or prejudice against that defendant nor against Mr. Dershowitz, an able advocate who has represented his client well in this case. I am aware of no potential conflict of interest in any respect, nor of any relationship that would make it improper for me to serve as judge in this case.

I regret Mr. Dershowitz' attitude about my participation and what I sincerely believe to be his unwarranted and uncalled for inferences about me as set out in his petition.

ENTERED BY ORDER OF THE COURT

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John P. Hehman, Clerk

Supreme Court, U.S.
FILED
JUL 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1869

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK L. HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

1. Whether a willful attempt to evade the payment of federal income taxes through the concealment of assets violates 26 U.S.C. 7201.

2. Whether the court's failure to charge the jury on the statute of limitations constituted plain error.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Benes v. *United States*, 276 F.2d 99	9
Biddinger v. *Commissioner of Police*, 245 U.S. 128	8
Sansone v. *United States*, 380 U.S. 343	6
Spies v. *United States*, 317 U.S. 492	5, 6
United States v. *Akmakjian*, 647 F.2d 12, cert. denied, 454 U.S. 964	8
United States v. *Atkinson*, 297 U.S. 157	10
United States v. *Batchelder*, 442 U.S. 114	7
United States v. *Carpenter*, 175 F. Supp. 362	5
United States v. *Chagra*, 754 F.2d 1181, cert. denied, No. 85-5392 (Oct. 21, 1985)	5
United States v. *Cook*, 84 U.S. (17 Wall.) 168	8
United States v. *Frady*, 456 U.S. 152	9
United States v. *Jannuzzio*, 184 F. Supp. 460	5
United States v. *Karlin*, 785 F.2d 90	8, 9
United States v. *Meeker*, 701 F.2d 685, cert. denied, 464 U.S. 826	8, 9
United States v. *Shorter*, 608 F. Supp. 871	5
United States v. *Swarthout*, 420 F.2d 831	7
United States v. *Voorhies*, 658 F.2d 710	5
United States v. *Walsh*, 700 F.2d 846, cert. denied, 464 U.S. 825	8, 9
United States v. *Wild*, 551 F.2d 418, cert. denied, 431 U.S. 916	8, 9
United States v. *Williams*, 684 F.2d 296, cert. denied, 459 U.S. 1110	8

Cases—Continued: Page

United States v. *Young*, No. 83-469 (Feb. 20, 1985) 9
Waters v. *United States*, 328 F.2d 739 9
Wisniewski v. *United States*, 353 U.S. 901 9

Statutes and rules:

18 U.S.C. 371 2
26 U.S.C. 6531 7-8
26 U.S.C. 7201 ..... *passim*
26 U.S.C. 7203 ..... 2, 4, 7
26 U.S.C. 7206(4) 3, 6, 7
Fed. R. Crim. P. 52(b) 9

Miscellaneous:

8 J. Moore, *Moore's Federal Practice* (2d ed. 1986) 8-9
1 C. Wright, *Federal Practice and Procedure* (2d ed. 1982) 9

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1869

FRANK L. HOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 781 F.2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1986. A petition for rehearing was denied on March 17, 1986 (Pet. App. A19-A24). The petition for a writ of certiorari was filed on May 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of willfully attempting to evade the payment of income taxes for the 1976 and 1979 tax years, in violation of 26 U.S.C. 7201, and four counts of the lesser included misdemeanor of willfully failing to pay income taxes for the 1975, 1977, 1978, and 1980 tax years, in violation of 26 U.S.C. 7203 (Pet. App. A1).[1] Petitioner was sentenced to concurrent terms of three years' imprisonment on the felony counts and five years' probation on the misdemeanor counts. The terms of probation were made to run concurrently with each other and consecutively to the sentences of imprisonment. The court of appeals affirmed (Pet. App. A1-A18).

1. The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. A2-A3), established that petitioner filed timely and accurate income tax returns for the 1975 through 1980 tax years. The returns showed that petitioner owed almost $300,000 in taxes, but he paid only a few thousand dollars in satisfaction of this liability (*id.* at A3). In an attempt to evade the payment of his remaining tax liability, petitioner engaged in the following conduct to conceal his assets from the IRS:

---

[1] Petitioner was acquitted on one count of conspiring to evade and defeat the payment of income taxes, in violation of 18 U.S.C. 371. Nancy Hook, petitioner's former wife, and Terry White, the proprietor of a grocery store where petitioner negotiated more than $1.2 million in checks, were charged as co-defendants in the conspiracy count, and Nancy Hook was charged as a co-defendant in each of the other counts. Their cases were severed from petitioner's and the charges against them were eventually dismissed.

he established a shell corporation to hold his assets; he used credit cards in the names of others; he purchased assets through nominees; he received checks and loans and repaid loans in fictitious names; he used large amounts of cash to make expenditures; and he used third parties to negotiate checks, sometimes made out to fictitious payees (*id.* at A2; Gov. Ct. App. Br. 2-12).

2. In affirming petitioner's convictions, the court of appeals unanimously rejected petitioner's argument that concealing assets in an attempt to evade the payment of tax does not violate 26 U.S.C. 7201 (Pet. App. A3-A7). The court found that his argument was contrary to the plain language of Section 7201, which establishes a violation if anyone "willfully attempts *in any manner*" to evade a tax or its payment (Pet. App. A4 (emphasis supplied by the court)); that his concealment of assets clearly satisfied Section 7201's requirement of an affirmative act of evasion; and that 26 U.S.C. 7206(4), under which petitioner contended he should have been indicted, is directed at different conduct and was not intended to limit the scope of Section 7201. The court, with one judge dissenting on this issue, also rejected petitioner's argument that his convictions on two of the six counts (relating to the 1975 and 1976 tax years) were barred by the statute of limitations (Pet. App. A7-A12). The court rejected petitioner's contention that the trial court's instructions required the jury to find petitioner guilty based on acts that occurred outside the limitations period (*id.* at A7-A9). The court also rejected petitioner's alternative argument that the trial court erred in not instructing the jury as to the applicable limitations period; it found that petitioner failed to object to the trial court's charge, and that the omission of a charge on the statute of limitations

issue was not plain error, "[g]iven the total lack of agreement and uncertainty that apparently existed at trial over the very operation of the statute of limitations in this case," as well as the speculative nature of petitioner's claim that the jury may have relied on acts outside the limitations period in convicting him (*id.* at A9-A12).[2]

ARGUMENT

1. Petitioner claims (Pet. 6-14) that his convictions for violating Section 7201 must be set aside because that section does not extend to attempts to evade a tax or its payment where timely and accurate returns are filed, and where the only act of evasion is the concealment of assets. The court of appeals' decision rejecting that claim is correct, and petitioner concedes that it is not in conflict with the decision of any other circuit.[3] Accordingly, further review by this Court is not warranted.

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[2] The court of appeals summarily rejected petitioner's challenges to the sufficiency of the evidence and to the admissibility of certain evidence; petitioner has not raised those issues in his petition.

Judge Merritt dissented on the statute of limitations issue (Pet. App. A14-A18). In his view, petitioner's failure to request any jury instruction on the applicable limitations period was excused by the district court's initial acceptance of the government's theory that petitioner's concealment of assets constituted a continuing offense in violation of Sections 7201 and 7203. Judge Merritt rejected the government's continuing offense theory on the ground that the language of those statutes did not compel the conclusion that Congress intended that those crimes be treated as continuing ones. Accordingly, he would have dismissed two of the six counts as time-barred and would have remanded the case for a new trial.

[3] The petition (at 6) states that the issue "had never before been addressed by any court" (see also Pet. App. A5 n.1);

a. As the court of appeals found, petitioner's argument is contrary to the language, intent, and construction of Section 7201 (Pet. App. A3-A7). Section 7201 establishes a violation if anyone "willfully attempts *in any manner*" to evade a tax or its payment. Petitioner's construction, on the other hand, would preclude prosecution if the taxpayers filed accurate tax returns and then concealed their assets before assessment to avoid paying the taxes due. Petitioner's construction of Section 7201 is also contrary to this Court's decision in *Spies* v. *United States*, 317 U.S. 492 (1943). There the Court interpreted the "in any manner" language to include a variety of affirmative acts, including, but not limited to, "concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal" (*id.* at 499). Petitioner does not dispute that such acts occurred here. He contends, however, that his conduct was not proscribed by Section 7201 because he filed timely and accurate tax returns (Pet. 6). Thus, he argues that the *Spies* case is inapposite because his affirmative acts of concealment did not "aggravate[] the interference with the assessment of tax which a failure to file creates" (317 U.S. at 10-11 (footnote omitted)). But the *Spies* decision did

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there are, however, several decisions upholding convictions under Section 7201 where part of the charge was that defendant had concealed assets (see *United States* v. *Chagra*, 754 F.2d 1181, 1182 (5th Cir. 1985), cert. denied, No. 85-5392 (Oct. 21, 1985); *United States* v. *Voorhies*, 658 F.2d 710, 713 (9th Cir. 1981); see also *United States* v. *Shorter*, 608 F. Supp. 871, 877-878 (D.D.C. 1985); *United States* v. *Jannuzzio*, 184 F. Supp. 460, 469 (D. Del. 1960); *United States* v. *Carpenter*, 175 F. Supp. 362, 364 (N.D. Ga. 1959)).

not countenance any such restrictive reading of the statute. As the Court said in *Spies*, "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'" (317 U.S. at 499).

Evading the *payment* of taxes is the evil at which the statute is directed, not just avoiding the *assessment* of taxes. See *Sansone* v. *United States*, 380 U.S. 343, 354 (1965). Obviously, the public treasury is hurt as much by nonpayment resulting from evading payment as from evading assessment. Thus, the court of appeals was correct in concluding that Section 7201 reaches conduct such as the secreting of assets that was at issue in this case.

b. The court of appeals (Pet. App. A5-A6) also correctly rejected petitioner's related argument (Pet. 11-14) that his conduct could be prosecuted only under Section 7206(4). That section provides:

> Any person who * * * [r]emoves, deposits, or conceals * * * any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property on which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax * * * shall be guilty of a felony * * *.

Petitioner argues (Pet. 12) that Section 7206(4), which was amended in 1954 to make it an offense to conceal property on which levy is authorized, as well as to conceal goods or commodities on which a tax can be imposed, proscribes the type of conduct for which he was prosecuted. Therefore, he argues, an interpretation of Section 7201 to cover conceal-

ment would implicitly attribute irrational conduct to Congress in amending Section 7206(4) to criminalize concealment activity that was already covered by Section 7201. As the court of appeals concluded, however, "nothing in the legislative history indicates that Congress in amending Section 7206(4) intended to limit the scope of Section 7201 or believed that the amendment was necessary to fill a gap left open by Section 7201" (Pet. App. A5 (citations omitted)). Rather, "the clear import of the amendment was to preserve the property of delinquent taxpayers so that the government can collect taxes due" (*id.* at A6). Thus, in amending Section 7206(4) Congress was not filling an existing gap in the law or impliedly repealing Section 7201, but was merely strengthening the statutory provisions specifically governing the collection of taxes. Congress may well have wanted to make certain that particular violations were felonious; in doing so, it is not unreasonable to suppose that Congress intended to give the prosecution the choice of proceeding under one of two statutes. See *United States* v. *Batchelder*, 442 U.S. 114 (1979). Finally, Section 7206(4) has been interpreted to apply only when a levy has been made (*United States* v. *Swarthout*, 420 F.2d 831 (6th Cir. 1970)); thus, petitioner's interpretation of Section 7201 would create a hole in the statutory scheme, since it would preclude felony prosecution under *any* statute of a taxpayer foresighted enough to conceal his assets prior to assessment.

2. Petitioner also argues (Pet. 15-22) that his Section 7201 felony conviction for the 1975 tax year, and his Section 7203 misdemeanor conviction for the 1976 tax year are each barred by the six-year statute of limitations applicable to tax prosecutions (26 U.S.C.

6531).[4] The court of appeals correctly rejected this claim on the ground that petitioner did not raise the statute of limitations defense at trial and that the omission of a statute of limitations instruction in the court's charge did not constitute plain error.[5]

a. In excuse of his dereliction at trial, petitioner suggests that the statute of limitations is not an affirmative defense but rather a jurisdictional bar to criminal prosecution that may be asserted at any time. The overwhelming weight of authority indicates otherwise. As this Court has stated, "The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases" (*Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917), citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872)). All the circuits that have recently addressed the question have likewise adopted the view that criminal statutes of limitations do not create jurisdictional bars to prosecution.[6] The law

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[4] The indictment in this case was returned on November 16, 1983. Consequently, the crimes charged in the indictment must have occurred after November 16, 1977.

[5] We note at the outset that, because the two felony convictions resulted in concurrent sentences, as did the misdemeanor convictions, a reversal of the 1975 and 1976 convictions would not change petitioner's sentence.

[6] See, *e.g.*, *United States* v. *Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986); *United States* v. *Meeker*, 701 F.2d 685, 687-688 (7th Cir.), cert. denied, 464 U.S. 826 (1983); *United States* v. *Walsh*, 700 F.2d 846, 855-856 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Williams*, 684 F.2d 296, 299 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), cert. denied, 454 U.S. 964 (1981); *United States* v. *Wild*, 551 F.2d 418, 421-425 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977). Accord 8 J. Moore, *Moore's Federal Practice* ¶ 12.03[2], at

is also clear that a statute of limitations defense may be waived either explicitly (see, *e.g.*, *United States* v. *Meeker*, 701 F.2d 685, 686-687 n.2 (7th Cir.), cert. denied, 464 U.S. 826 (1983)) or, as it was here, by a defendant's failure to object at trial to the absence of a statute of limitations instruction (see, *e.g.*, *United States* v. *Karlin*, 785 F.2d 90, 93 (3d Cir. 1986); *United States* v. *Walsh*, 700 F.2d 846, 855 (2d Cir.), cert. denied, 464 U.S. 825 (1983)). In light of these precedents, review by this Court of the question whether a statute of limitations defense can be waived, and under what circumstances, is not warranted.

b. Nor did the trial court's omission of a statute of limitations instruction amount to plain error (see Fed. R. Crim. P. 52(b)). The power granted to courts of appeals by the plain error rule is to be used only in exceptional circumstances where the error is " 'particularly egregious' " (*United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14, quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982)). To be

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12-28 (2d ed. 1986); 1 C. Wright, *Federal Practice and Procedure* § 193, at 705 (2d ed. 1982).

Petitioner contends (Pet. 19 n.4) that there exists a conflict in the circuits on this issue, citing *Waters* v. *United States*, 328 F.2d 739, 742-743 (10th Cir. 1964), and *Benes* v. *United States*, 276 F.2d 99, 107-109 (6th Cir. 1960). The language relied on in *Benes* was, however, dictum (see *United States* v. *Meeker*, 701 F.2d at 688; *United States* v. *Wild*, 551 F.2d at 422 n.8) and, of course, an intracircuit conflict does not merit this Court's review in any event (see Pet. App. A12 n.10; *Wisniewski* v. *United States*, 353 U.S. 901 (1957)). As for *Waters*, we are aware of no case in which the Tenth Circuit has followed it since it was decided in 1964. Moreover, we note that in *Waters*, the government failed to dispute the issue (328 F.2d at 742-743).

plain error, the error must be "obvious or * * * otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson*, 297 U.S. 157, 160 (1936) (citations omitted)). As the court of appeals determined (Pet. App. A11-A12), this case presented no such egregious circumstances.

The district court found "that at no time prior to trial, during trial or in conjunction with his motion for judgment of acquittal at the close of the government's case in chief and at the close of all the evidence did [petitioner] raise the defense of statute of limitations as a ground for acquittal" (7/5/84 Memorandum and Order 19 n.1) (Gov. Ct. App. Br. 32).[7] Significantly, in his motions for a judgment of acquittal at trial, petitioner did raise the statute of limitations as a bar to conviction on the conspiracy count, but he never suggested that it barred his conviction on the substantive counts (see 25 Tr. 7-10; 26 Tr. 13) (Gov. Ct. App. Br. 32); the issue was first raised by petitioner in his post-trial motion for judgment of acquittal.[8] In light of "the total lack of

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[7] Citations to the proceedings in the district court are taken from the government's appellate brief.

[8] Petitioner seems to imply that his failure to object was insignificant in light of "a legal ruling which eliminated the [statute of limitations] defense" (Pet. 21). This contention is meritless. When the trial court denied co-defendant Nancy Hook's statute of limitations argument, it did so "without prejudice to defendant renewing her motion at the close of the government's evidence if she believes the government has failed to present sufficient evidence from which the jury could find that within the six-year limitations period [she] engaged in affirmative acts in furtherance of the alleged conspiracy or attempt to evade or defeat the payment of taxes" (2/27/84

agreement and the uncertainty that apparently existed at trial over the very operation of the statute of limitations in this case" (Pet. App. A11-A12), it cannot seriously be argued that the district court should have recognized any error sua sponte.

The trial court's alleged error was an act of omission, not commission and, as the court of appeals concluded, "merely created a situation in which the jury could have convicted [petitioner] while finding that the crimes occurred before November 16, 1977, a possibility we find too speculative to require reversal based on plain error" (Pet. App. A12 (citations omitted)). Moreover, even on petitioner's ultimate view of when the statute began to run (see Pet. App. A11), both the district court and the court of appeals found that there was evidence of "numerous acts by [petitioner] occurring within the limitations period which could have been employed by the jury to conclude that the Section 7201 and Section 7203 crimes for which [he] was convicted were not complete until after November 16, 1977" (Pet. App. A9; 7/5/84 Memorandum and Order 14, 16 (Gov. Ct. App. Br. 29 n.10)). Because there was an ample

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Memorandum and Order 3) (Gov. Ct. App. Br. 32 n.13). Thus, although the district court held, in denying Nancy Hook's pretrial motion for dismissal, that the statute of limitations began when the last affirmative act was completed, the holding did not relieve petitioner of the obligation to renew the motion at trial if he sought to preserve the issue. As the court of appeals noted, "[o]bjections to jury instructions are necessary to afford the trial judge the opportunity to correct mistakes in his charge" (Pet. App. A10 n.8), and a contrary rule would increase "the possibility that a criminal defendant will rely on ambiguous or incomplete jury instructions regarding the statute of limitations and appeal only if the jury verdict is adverse" (*id.* at A13 n.10).

factual basis on which the jury could have rejected the statute of limitations defense if that defense had been raised at trial, this case does not present the kind of miscarriage of justice that is required to invoke the plain error rule.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Not only was any error not "plain," there was no "error" at all, since the offense was a continuing one and therefore there is no question that the statute had not run. Under the circumstances, however, we agree with the court of appeals (Pet. App. A11-A12 n.9) that this issue need not be reached.

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